No. 10395

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON. NORTHERN DIVISION

HON. JOHN C. BOWEN, *U. S. District Judge*

REPLY BRIEF

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The controlling facts are not in dispute. The question is as to the application of the statute to admitted facts. Article 14 of Treasury Regulation 91 (quoted in the Government Brief, pages 4-5) sheds little, if any, light on the question, for the definition of "wages" as contained in the Regulation is merely a repetition of the same definition as it appears in the statute. The explanatory paragraphs favor the appel-

lants rather than the Government. When the paragraph of the cited Regulation (appearing at the top of page 5 of the Government Brief) is applied to the admitted facts, it reads:

> "* * * Privileges (the privilege of eating in the cannery mess house and sleeping in the cannery bunk house) furnished * * * by an employer * * * are not considered as remuneration for services if * * * furnished by the employer merely as a means of promoting * * * efficiency of his employees."

That is exactly the reason why board and lodging is furnished by the cannery operator—to promote the efficiency of the operation. On page 12 of the Government Brief in attempting to distinguish the rulings cited in our Opening Brief, it is said:

> "Moreover, in the cases upon which the taxpayer relies, there was a determination that the board and lodging were furnished because necessary for the convenience of the employer. * * * There is no finding in this case that the maintenance of the employees was actuated for such a reason."

True, the trial court refused to make that finding, but it should have done so for such is the undisputed evidence upon which we base our second specification of error (Opening Brief, page 12) reading:

> "The trial court erred in failing to find that board and lodging furnished by Pacific American Fisheries, Inc., to its employees in Alaska during the operating seasons were furnished for the convenience of the employer, and the value thereof, therefore, was not taxable as wages to its employees."

The question at issue cannot be solved as suggested in the Government Brief at page 9 by comparing the cash wages paid with the estimated value of board and sustenance furnished, and asserting that the latter amount is "quite substantial" when compared with the former. Neither the statute nor the regulations fixes such standard and who is to determine when one factor is quite substantial or ceases to be quite substantial as compared with the other.

In cases cited in our Opening Brief, page 20, the value of the quarters and meals furnished the matron at the Sanitorium was quite substantial; the value of the living furnished the hotel manager was quite substantial; and the value of the quarters furnished the army officer was quite substantial. It is fair to assume that the cost of maintaining a professional baseball player in Florida is quite substantial as compared with the cost of feeding a fisherman in Alaska. Nevertheless, the value of the maintenance of the baseball player is not "income" or "wages" within the meaning of either the income tax laws or the Social Security Act.

Much more significant than the Treasury Regulations cited in the Government Brief is the definition of wages as contained in the "Fair Labor Standards Act of 1938," in Section 3 of which, the term "wage" for the purposes of that Act is defined as follows:

> " 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily fur-

nished by such employer to his employees." (52 Statutes 1060 Section 3-M, page 1061)

If Congress in passing the Social Security Act in 1935 had intended wages to have a different meaning than in the earlier income tax statutes, it must be assumed that provision to that effect would have been made as was done later in passing the "Fair Labor Standards Act of 1938."

On page 12 of the Government Brief referring to the various rulings of the Department it is said:

> "These varied rulings are based on factual distinctions which it is idle to attempt to reconcile. If they be thought inconsistent some of them must be erroneous. If so, taxpayer is not entitled to a perpetuation of the error."

The court is not advised which ruling is thought to be erroneous, and while it may be true that a taxpayer is not entitled to a perpetuation of the error, it is equally true that the Department is not entitled to a perpetuation of the confusion.

Respectfully submitted,

KERR, MCCORD & CAREY
STEPHEN V. CAREY
Attorneys for Appellants, Pacific American Fisheries, Inc., a corporation, and Alaska Pacific Salmon Company, a corporation.

TERMS OF COURT

NORTHERN DIVISION
SEATTLE:
FIRST TUESDAYS MAY AND NOVEMBER
BELLINGHAM:
FIRST TUESDAYS APRIL AND OCTOBER
SOUTHERN DIVISION
TACOMA:
FIRST TUESDAYS FEBRUARY AND JULY

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

WESTERN DISTRICT OF WASHINGTON
Seattle 4, Washington
September 17th, 1943

ST
9/16

Mr. Paul O'Brien
Clerk, Circuit Court of Appeals
Ninth Circuit
Seattle, Washington

Re: Pacific American Fisheries, Inc., Appellant, v. United States, Appellee, and Alaska Pacific Salmon Co., Appellant, v. United States, Appellee - No. 10395

Dear Sir:

As the attorney of record in the above entitled case, I respectfully request that you call to the attention of the members of the Circuit Court of Appeals, Ninth Circuit, the case of

California Employment Commission v. Black-Foxe Military Institute, 110 Pacific 2d, 729.

I believe that the above-cited case will be helpful to the Court in its consideration of the problem posed in the above matter.

A copy of this letter is being sent to counsel for the appellants, Kerry, McCord and Carey, 1309 Hoge Building, Seattle, Washington.

Very truly yours,

J. CHARLES DENNIS
United States Attorney

MK:gh